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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 849

CITY OF MILWAUKEE,

Petitioner,

vs.

CITY OF WEST ALLIS,

Respondent.

REPLY BRIEF OF PETITIONER

WALTER J. MATTISON,
City Attorney,
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The brief of respondent was received on April 8, 1941.

A.

A municipal corporation operating a public utility may invoke the Fourteenth Amendment of the Federal Constitution as against another municipal corporation in an action for an amount due for services.

Cases cited by respondent in its brief at pages 5-6 are inapplicable as the action at bar did not involve the state of the creation of petitioner. The case of *City of Trenton*

vs. New Jersey, 262 U. S. 182, 67 L. Ed. 937, strongly relied upon by respondent, was a case in which the municipality was sued by the state to collect a license fee.

Petitioner as the owner of a water utility is and was a public utility,—*Pabst Corporation vs. Milwaukee,* 190 Wis. 349, 208 N. W. 493,—operating such plant in its proprietary capacity and in such capacity having the same rights and liabilities as a privately owned utility.

State Journal Printing Co. vs. Madison, 148 Wis. 396, 134 N. W. 909;

Milwaukee E. R. & L. Co. vs. Milwaukee, 209 Wis. 656, 660, 245 N. W. 856;

Strohmaier vs. Wisconsin Gas & Electric Co., 214 Wis. 564, 253 N. W. 798.

It would be a sad reflection upon the law if in such circumstances a municipally owned and operated utility could not sue a consumer outside of its city limits, and recover for amounts due for services rendered, nor be entitled to the protection of the constitution against decisions of the appellate court below.

B.

Failure to file rate excused by injunction.

Petitioner was in no position to comply with the statutes as to filing rates because of the injunction. The injunction prevented petitioner from doing anything to change the rates. That distinguishes the case at bar from the case of *Kilbourn City vs. Southern Wisconsin Power Co.,* 149 Wis. 168, 135 N. W. 499 (referred to at pages 10-11 of respondent's brief) and makes applicable the rule of the case of *Quarles vs. City of Appleton,* 299 F. 508 (referred to at pages 25, 28 of petitioner's brief in support of its peti-

tion). A party who by his act prohibits compliance with a statute should not be heard to question such non-compliance.

No injunction was involved in the case of *Kennebunk, K. & W. Water Dist. vs. Inhabitants of Town of Wells,* 128 Me. 256, 147 A. 188 (referred to at page 11 of respondent's brief), which distinguishes that case.

C.

Issue as to compliance with Section 196.20 or applicability of Section 196.22 never litigated, either in former suit or in case at bar.

This subject has been previously covered (pages 20-22 of petitioner's brief), but in addition to the cases cited in petitioner's brief in support of its petition that a writ of certiorari will be granted if the appellate court decides the case upon an issue not presented below, we cite the case of *Jay C. Hormel, petitioner, vs. Guy T. Helvering, Com'r of Internal Revenue* (No. 257, October 14, 1940), 85 L. Ed. Advance Opinions 1940-1941 (1), page 56. In that case a petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit was granted by the United States Supreme Court.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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City Attorney,
Counsel for Petitioner.